No. 76-200

In the Supreme Court of the United States

OCTOBER TERM, 1976

TEXAS EDUCATION AGENCY (AUSTIN INDEPENDENT SCHOOL DISTRICT), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–43) is reported at 532 F. 2d 380. The opinion of the district court (Pet. App. 44–57) is unreported. An earlier opinion of the court of appeals is reported at 467 F. 2d 848.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. A petition for rehearing was denied on June 9, 1976. The petition for a writ of certiorari was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Austin Independent School District has engaged in racial discrimination against its black and Mexican-American students.

2. Whether the court of appeals erred in remanding the case for development of a plan that supplies relief from the effects of the discrimination in the elementary schools and against Mexican-American students.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the Western District of Texas pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c–6. On September 4, 1970, the district court entered an interim order directing the Austin Independent School District (hereafter referred to as AISD) to implement standard provisions requiring desegregating districts in the Fifth Circuit to eliminate racial discrimination in several aspects of school operations, including faculty and staff assignments, new school construction and the provision of transportation. See *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (C.A. 5) (*en banc*).

After a six-day trial in 1971 the district court held that AISD had not discriminated against Mexican-Americans, but that the dual school system historically maintained for blacks had not been eradicated (Pet. App. 74–84). It entered an order approving a plan that closed two predominantly black secondary schools

and reassigned their students to predominantly Anglo secondary schools (see Pet. App. 3, 58–73).[1] This plan scattered blacks of secondary school age throughout the district, but put the entire burden of transportation on blacks.

The court of appeals, sitting *en banc,* reversed. Six judges joined an opinion detailing a history of discriminatory actions by the AISD (467 F. 2d at 852–875). These six judges concluded that AISD was responsible for the separation of Mexican-Americans from Anglos in the schools, and that the district court's contrary findings were clearly erroneous. Eight other judges concurred in the result, concluding that "discriminatory segregation exists against Mexican-American students and that the proposed part-time integration plan of the school district is inadequate as a desegregation plan" (*id.* at 885). The court remanded the case to the district court with directions to identify those schools that were segregated as a result of racial or ethnic discrimination and to eliminate its effects by using specified desegregation techniques listed on a priority basis (*id.* at 884–885).[2] The six judges joining in the lead opinion dissented from this disposition of the question of remedy; they would

[1] The plan also provided for meetings of elementary level students on an integrated basis one week per month to participate in certain cultural activities (Pet. App. 23). This portion of the plan was never implemented.

[2] The majority observed that "[t]here may be * * * one race schools which are the product of neutral, non-discriminatory forces," and concluded that the racial imbalance attributable to these forces need not be corrected (*id.* at 884).

have prescribed a remedy without further evidentiary proceedings (*id.* at 871–875, 886–889).

On remand the district court once more concluded that the AISD had not discriminated against Mexican-Americans; it approved a plan submitted by the AISD for desegregating the sixth grade of black elementary schools (Pet. App. 44–57).

A panel of the court of appeals reversed and held, for the second time, that AISD had discriminated against both blacks and Mexican-Americans and that the partial desegregation plan submitted by the AISD is constitutionally insufficient. It remanded for the formulation of an appropriate plan.

DISCUSSION

1. Petitioners direct most of their argument against certain language the panel employed to justify its conclusions. They concentrate on the panel's statements (Pet. App. 16–17) that

> the AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin. The plaintiffs have therefore established a prima facie case of *de jure* segregation of Mexican-Americans in all portions of the school district except the residentially integrated central city area. [Footnotes omitted.]

and (Pet. App. 20) that

> school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy.

These statements appear to mean that a school board has a constitutional duty to correct racial imbalance occurring because of the use of a neighborhood school policy in a district that is not racially homogeneous. Thus, petitioners contend, the question presented by this case is "quite simply" (Pet. 9) whether a racially neutral and non-discriminatory practice of assigning students to the schools closest to their homes is unconstitutional because of its racial effects. We agree with petitioners that, if the court of appeals meant this, it is wrong.

The portions of the panel's opinion we have quoted are not necessarily read as petitioners do, however. They also might mean that a "neighborhood school" policy is impermissible when it is used as a device to enforce or perpetuate the effects of previous racial discrimination in the operation of the schools. For example, if school officials discriminate in making school siting and capacity decisions, a "neighborhood school" policy may be necessary to ensure that the school serves the racial group for which it was intended. Moreover, the court of appeals simply may have been offering an alternative ground (which we believe incorrect) for a conclusion that we believe is correct—that the AISD engaged in pervasive acts of discrimination against Mexican-Americans.

We discuss in what follows both our doubts about the panel's rationale and the reasons why we believe that the judgment is correct.

a. A policy of assigning students to the closest or most convenient school serving the grade in which they are enrolled (the neighborhood school policy) is used in many school districts. Congress has declared that it is the best policy for making student assignments. Equal Educational Opportunities Act of 1974, Pub. L. 93–380, Sections 202(a)(2), 214(a), 88 Stat. 514, 517, 20 U.S.C. (Supp. V) 1701(a)(2) and 1713(a). A neighborhood school policy inevitably produces schools whose racial and ethnic composition closely reflects that of the neighborhoods in which the schools are located. To this extent, school authorities selecting a neighborhood school policy can be said to "intend" racially imbalanced schools, if the school district is not racially homogeneous.

It does not follow, however, that the neighborhood school policy amounts to racial discrimination, unless the residential patterns are caused by official acts designed to segregate the schools. An otherwise neutral action is not discriminatory solely because it has a racially disproportionate effect. *Washington* v. *Davis,* No. 74–1492, decided June 7, 1976, slip op. 7–18; *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 205, 208. The essential element of the constitutional violation is "a current condition of [racial separation] resulting from intentional state action" (*id.* at 205.).

If the language of the panel is taken at face value, it has abolished the distinction between racial discrimination in the operation of the schools and its effects (*de jure* segregation) and racial imbalance

caused by other factors, and which the school authorities have not rectified (*de facto* segregation). By requiring the district court to infer intent to discriminate from the fact that the school authorities have not attempted to ameliorate the effects of racial separation in residential patterns, the panel has avoided the need to prove intent to discriminate.

Deeds often speak more loudly than words, and intent sometimes may be inferred from effects alone (see *Washington* v. *Davis, supra,* slip op. 11; *id.* at 1–2 (Stevens, J., concurring)). But for the court of appeals to compel the district court to infer intent from effects alone in situations like the present one is to abolish the intent requirement and to abolish the further requirement that the racial separation have been caused by the acts of the State intended to affect the operation of the schools (rather than, for example, the acts of private individuals choosing where to make their homes). See also *Spencer* v. *Kugler,* 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.).[3]

In our view, the panel has neglected to make a crucially important distinction that is necessary to determine when discriminatory intent may be inferred from racially disproportionate effects. We submit that when the acts of school authorities (even if neutral on their face) produce more racial separation in the

[3] In *Spencer* the Court summarily affirmed the district court's holding that extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines.

schools than there is in the residential patterns of the school district as a whole,[4] the court may properly (but need not always) infer that the school authorities acted with intent to discriminate. On the other hand, when a facially neutral neighborhood assignment policy produces no more separation than occurs in the residential patterns, only evidence that the school authorities acted with discriminatory intent will allow a finding that they practiced racial discrimination. In other words, proof that school authorities added to racial separation may be enough to support a finding of intent; proof that school authorities failed to reduce separation attributable to forces outside the schools is never (by itself) enough.[5] To the extent that the court of appeals meant to require the district court to infer intent in the former situation, or to allow it to infer intent in the latter, its decision is incorrect.

b. The judgment of the panel rests on firmer ground, however. Its analysis of the neighborhood school policy

[4] Or than there would be if schools were evenly dispersed throughout the district and contiguous attendance zones were used.

[5] The panel's contrary conclusion is apparently based upon a belief that predominantly black or Mexican-American schools are inherently inferior, regardless of the cause of the predominance, and that school authorities must rectify this inferiority or be seen to intend it. See the six-judge opinion in the *en banc* decision (467 F. 2d at 862–863 and n. 20), upon which the panel relied in part. We agree with Judge Sobeloff that there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action. See *Brunson* v. *Board of Trustees*, 429 F. 2d 820, 823–827 (C.A. 4) (*en banc*) (Sobeloff, C. J., concurring).

was not responsive to the arguments of either the plaintiff United States or the intervenors. The panel itself stated that the case presents "not only the use of a neighborhood assignment policy" (Pet. App. 20) but also the employment of an extensive series of discriminatory devices that had been discussed by the *en banc* court (see 467 F. 2d at 854 n. 7, 855, 856–857, 883). It wrote (Pet. App. 16–17 n. 13):

> We held in [the *en banc* decision]
>
> > "that the AISD has, in its choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system."
>
> 467 F. 2d at 865–66. We also found that "[t]he natural and foreseeable consequence of these actions was segregation of Mexican-Americans." 467 F. 2d at 863. The Supreme Court inferred segregative intent from the same kind of circumstantial evidence in *Keyes*. See 413 U.S. at 192 * * *. The inference of segregative intent that the Supreme Court made regarding the Denver school authorities is equally applicable to their counterparts in Austin.

Although the many opinions issued by the court of appeals *en banc* are not without ambiguity, we believe that they demonstrate that all 14 judges who sat on the case concluded that the AISD had discriminated against blacks and Mexican-Americans, and that some of the effects of that discrimination had not yet been

eliminated. The six-judge lead opinion (467 F. 2d at 861–870) concluded that AISD had discriminated by not eliminating racial separation, however caused. The eight-judge majority wrote that it was necessary to remand the case "with direction that the dual school system and all discriminatory segregation against Mexican-American and black students be eliminated 'at once'" (467 F. 2d at 883). Although seven of these eight judges would have preferred not to reach the merits (see 467 F. 2d at 889–890, 891), they did cast votes, and the fact that they concurred in the result reversing the district court establishes that they thought that at least some discrimination had been established. They did not, however, articulate the theory that led them to this conclusion. Part of that obscurity has survived; although the panel (which included one judge from the eight-judge majority of the *en banc* court) asserted (Pet. App. 4) that "[t]he en banc Court divided only on the issue of remedy", it did not discuss the possibility that the 14 judges may have been using different theories to support their conclusions, or that these different theories may lead to different remedial plans.

Despite this opacity in the opinions of the court of appeals, we believe that the evidence is sufficient to support a finding of discrimination, and that this alternative ground is sufficient to support the judgment of the court of appeals, whether or not the court relied upon it. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. We say this recognizing that some of the evidence concerning discrimination is old, that some of the effects of the discrimination may long since have dissipated, and that the district court concluded that petitioners did not act with discriminatory intent. The district court's finding with respect to intent is, we believe, clearly erroneous; and the other difficulties in the evidence go not to the existence of discrimination but to the remedy that is necessary and appropriate to eliminate its lingering effects—a matter to be addressed on remand from the present court of appeals decision.

The extensive evidence presented during two lengthy hearings of discriminatory practices is summarized school-by-school in the brief for the United States in the court of appeals.[6] Prior to 1954 certain schools were designated for Mexican-Americans in much the same manner that other schools were designated for blacks, although only the latter designation was required by state law. 467 F. 2d at 886–887. From 1954 until the date of trial petitioners continued to operate a segregated school system by perpetuating the effects of pre-1954 discrimination. The school authorities also undertook a series of actions designed to perpetuate the concentration of Mexican-Americans into a few schools. 467 F. 2d at 867–868, 870. They created dual-overlapping zones comprising two schools; Anglos were expected to attend one of the schools, Mexican-Americans the other. They built new schools deep inside Mexican-American neighborhoods, with a capacity such that the schools served only the

[6] We are lodging a copy of that brief with the Clerk of the Court.

Mexican-American neighborhood and were overwhelmingly Mexican-American on opening. Other locations that would have produced more balanced enrollments were rejected. School boundaries were manipulated so that pockets of Anglo students near or in Mexican-American neighborhoods attended predominantly Anglo schools. Teachers were assigned on a patently discriminatory basis. We submit that the evidence amply supports a conclusion that petitioners availed themselves of a neighborhood school assignment system only when that would produce the maximum feasible separation of Anglos from Mexican-Americans; when it did not, the AISD resorted to gerrymandering, discriminatory school siting and capacity decisions, dual-overlapping zones, and other familiar discriminatory devices of the sort condemned in *Keyes*.

The court of appeals therefore may have meant no more in its discussion of neighborhood schools than that a school district cannot absolve itself of responsibility for its discrimination by hiding behind a claim that it *now* has a firm policy of assigning students to neighborhood schools. When that policy has been used in concert with obvious tools of discrimination, it may come to partake of a discriminatory quality and be an instrument of discrimination itself. A neighborhood school policy is an enforcement tool of a policy of discrimination in some circumstances; to use the example given earlier, it ensures that students attend the school designed, located, and built to a particular capacity expressly to be able to serve only students of one race or ethnic group. If this is all the

court of appeals meant, we have no quarrel with it.

c. If the Court were to undertake plenary review of this case, we would urge that the judgment of the panel be affirmed, in light of the evidence of extensive intentional discrimination against Mexican-Americans. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88. But we are concerned that the panel's language, which appears to conflict with holdings of many other courts of appeals (see Pet. 21–22), may inject unnecessary uncertainty into school litigation in the Fifth Circuit. We therefore do not oppose the granting of the petition. It may be useful for this Court to clarify the governing legal standards (perhaps summarily, as it did in *Dillingham* v. *United States*, 423 U.S. 64) and to remand for appropriate disposition of the case by the court of appeals, in light of the views we have outlined here and the intervening decision in *Washington* v. *Davis*, *supra*.

2. Petitioners argue (Pet. 23–31) that the panel should not have remanded the case for the formulation of a new remedial plan. If, as we have argued, however, the panel correctly concluded that the district court had erred in holding that there had been no discrimination against Mexican-Americans, it follows that a remand is required for the formulation of a remedy that would eliminate the lingering effects of that discrimination. No more need be said to demonstrate the propriety of at least a limited remand.

Petitioners contend, however, that the "practicalities" of the situation support the plan adopted by the district court, which involved no alteration of attend-

ance patterns in any grade except the sixth. The district court viewed the secondary schools as "totally desegregated" (Pet. App. 21) and concluded that transportation of students attending kindergarten through the fifth grade would be deleterious and impractical. We agree with the panel that the district court erred—both because of its failure to recognize discrimination against Mexican-Americans and because it has long been established that plans exempting whole grade levels are unacceptable. See, *e.g., Flax* v. *Potts,* 464 F. 2d 865, 869 (C.A. 5).

We also agree with the opinion of eight judges of the *en banc* court (see 467 F. 2d at 884) that the goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. *Green* v. *County School Board,* 391 U.S. 430, 438. It is to eliminate these effects wherever they may be found in the school system, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions" (*Keyes, supra,* 413 U.S. at 203).

In our view, "desegregation" is nothing more or less than elimination of *de jure* segregation, "root and branch." The "desegregation" that courts are both empowered and obligated to accomplish is not the elimination of all of the racial separation without regard to its causes, whether *de jure* acts or *de facto*

social processes. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination; if it were otherwise, there would be no meaning to the requirement of "state action" as a precondition to a violation of the Fourteenth Amendment. The attributes that make a system a dual system can often be eliminated without an insistence upon a racial composition in each school that in some degree reflects the racial composition of the school district as a whole. This is the critical line between racial discrimination and its effects, on the one hand, and mere difference of racial composition of attendance, on the other.[1]

The proper approach therefore requires a court to seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. A conclusion that there has been discrimination with respect to particular schools does not support a judicial order that racial balance must be produced throughout the school system. This follows directly from principles long accepted by this Court. "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable

[1] So long as school authorities operate "just schools" instead of one set of schools for blacks and another set for whites, it matters not at all whether one particular school has more blacks than whites. The schools of Vermont are not segregated even though most of them are all white. The Fourteenth Amendment does not prefer black schools, white schools, or racially balanced schools—it demands, instead, a policy of neutrality in which neither merit nor demerit is assigned on the basis of color, except insofar as is necessary to rectify the effects of past distinctions made on this impermissible basis. Cf. *Milliken* v. *Bradley,* 418 U.S. 717.

principles." *Brown* v. *Board of Education*, 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. A finding of a violation does not set a court of equity at large to produce results that never would have occurred if all constitutional provisions had been observed. The court must instead order whatever steps are necessary for "disestablishing state-imposed segregation" (*Green*, *supra*, 391 U.S. at 439).

As the Court emphasized in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." To this end, there is broad equitable power "to remedy past wrongs" (*ibid.*). But the task is not to produce a result merely because the result itself may be attractive. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy" (*id.* at 16). "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken* v. *Bradley*, 418 U.S. 717, 746). Cf. *Franks* v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976, slip op. 23.[8]

[8] *Hills* v. *Gautreaux*, No. 74-1047, decided April 20, 1976, is not to the contrary. The Court there specifically relied on the circumstance that "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits" (slip op. 14).

This Court's cases, then, support our position. And they also support the judgment of Congress in the Equal Educational Opportunities Act of 1974 that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court * * * shall seek or impose only such remedies as are *essential to correct particular denials* of equal educational opportunity or equal protection of the laws" (Section 213, 88 Stat. 516, 20 U.S.C. (Supp. V) 1712; emphasis added).[9]

The application of these principles to the case at hand requires a remand for formulation of a more comprehensive plan. This is not a case where a school board made an effort to devise a plan related to the scope of the violation. The *en banc* court unanimously rejected a similarly incomplete plan and directed petitioners to proceed "to eliminate the dual school system as it has existed in Austin together with any and all discriminatory segregation which exists against Mexican-Americans and black students" (467 F. 2d at 884). AISD and the district court neglected this command. Petitioners' asserted practicalities are "vague, conclusory and unsupported" (Pet. App. 24), and they are hardly sufficient to justify confining the plan to a single grade.

This case is now more than six years old, and it is understandable that the court reversed the district's court's selection of the AISD plan and criticized its

[9] See generally Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971). Cf. Fiss, *The Jurisprudence of Busing*, 39 L. and Contemp. Prob. 194 (1975).

refusal to give serious consideration to the only plan in the record (the Finger Plan) purporting to deal with the effects of the discrimination. In light of the history of this case, the court of appeals had little alternative but to order the district court either to implement the Finger Plan or to appoint "a master to draft a comprehensive tri-ethnic desegregation plan consistent with this opinion and the decisions of the United States Supreme Court" (Pet. App. 36). An order to devise a plan consistent with this Court's decisions does not warrant this Court's review.

CONCLUSION

For the reasons stated at pages 6–13, *supra,* we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.

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